

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEFFREY H. PICKERING
Claimant

VS.

**CLASSIC STEAMBRITE AND
STEAM MASTER CARPET**
Respondent

AND

AETNA CASUALTY & SURETY COMPANY
Insurance Carrier

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Docket No. 210,457

ORDER

The respondent requested Appeals Board review of the January 9, 1997, Award entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument by telephone conference on May 13, 1997.

APPEARANCES

Claimant appeared by his attorney, W. Walter Craig of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Gregory D. Worth of Lenexa, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award of the Administrative Law Judge.

ISSUES

The single issue before the Appeals Board for review is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Claimant fell down some stairs in October 1995 while working for the respondent cleaning carpet at a residence. Claimant continued to work for the respondent after the fall but experienced increasing pain and discomfort in his left arm as he performed his regular work duties. Finally, on December 14, 1995, claimant could not continue to perform the carpet cleaning duties and notified his supervisor, respondent's owner, Steve Taaffe, of his problems.

Respondent provided medical treatment for claimant. Claimant ultimately came under the treatment of neurosurgeon John Hered, M.D., of Wichita, Kansas. Dr. Hered first saw claimant on January 8, 1996, and diagnosed claimant with a herniated disc at C6-7. In an effort to relieve claimant of his pain and discomfort, Dr. Hered, on February 6, 1996, performed an anterior cervical discectomy.

Dr. Hered released claimant to return to work without permanent restrictions on April 17, 1996. Dr. Hered did not express an opinion on claimant's functional impairment as a result of claimant's cervical injury and surgery. The doctor did attribute claimant's injury to the fall at work. Dr. Hered testified that claimant was able to perform the carpet cleaning work activities for the respondent. Furthermore, the doctor testified that claimant was able to return to regular work in the open labor market without restrictions. However, on cross-examination, the doctor admitted he did not know what specific job duties claimant had to perform as a carpet cleaner. He also admitted, that if the duties were different than what he understood, then restrictions could be appropriate.

At the request of claimant's attorney, claimant was examined and evaluated, on May 21, 1996, by Ernest R. Schlachter, M.D., of Wichita, Kansas. Dr. Schlachter diagnosed claimant with status following a C6-7 cervical discectomy. Dr. Schlachter opined that claimant's cervical injury suffered while employed by the respondent resulted in a 9 percent permanent functional impairment of the body as a whole based on the AMA Guidelines (sic). The doctor restricted claimant's activities to occasional lifting of 50 pounds, frequent lifting of 20 pounds, constant lifting with both hands of 10 pounds, and to avoid overhead work.

Dr. Schlachter also expressed an opinion on claimant's loss of work task performing ability for jobs claimant performed in the 15-year period next preceding his date of accident

of December 14, 1995. Dr. Schlachter was presented with a work task assessment report that was developed by vocational rehabilitation expert Jerry D. Hardin following an interview with the claimant. Mr. Hardin's deposition was taken by the claimant and the work task loss assessment report was admitted into evidence without objection. Dr. Schlachter testified that he had reviewed the work task loss assessment report developed by Mr. Hardin utilizing Dr. Schlachter's permanent restrictions and agreed with Mr. Hardin's conclusions. Mr. Hardin's work task loss assessment report dated June 10, 1996, indicated that claimant had a 35 percent loss of work task performing ability.

At the time Dr. Hered released claimant to return to work on April 17, 1996, respondent did not have a job for the claimant. Claimant testified at the regular hearing on September 4, 1996, that he was not working and was receiving unemployment benefits. Claimant testified that, after the respondent refused to return him to work, he actively sought other employment. At the time of the regular hearing, claimant was enrolled in a computer class at Wichita State University for the purpose of acquiring additional job skills in order to obtain other gainful employment.

The parties stipulated to claimant's date of accident as December 14, 1995, his last day worked for the respondent. Therefore, claimant's entitlement to permanent partial disability benefits is contained in the July 1, 1993, amendments to K.S.A. 44-510e. That statute generally provides that an injured employee is entitled to a work disability, if the employee's post-injury gross average weekly wage does not exceed 90 percent or more of his pre-injury average weekly wage. The percentage of work disability also has to exceed his functional impairment or the employee is entitled to the higher functional impairment rating. The work disability test contained in K.S.A. 44-510e(a) is a two-prong test. The first prong is determined by claimant's loss of work task performing ability as expressed by the physician during the 15-year period preceding the accident. The second prong is the difference between claimant's pre-injury average weekly wage and claimant's post-injury average weekly wage.

The respondent argues that Dr. Schlachter's testimony is not credible as a physician's opinion on the percentage of claimant's loss of work task performing ability as required by K.S.A. 44-510e(a). The respondent contends that Dr. Schlachter's acceptance of the work task loss as developed by vocational rehabilitation expert Jerry Hardin utilizing Dr. Schlachter's permanent restrictions is not a physician's opinion on claimant's work task loss. The respondent argues that essentially this is Mr. Hardin's opinion and not the independent opinion of a physician. The Appeals Board disagrees with the respondent's argument. Dr. Schlachter testified that he had an opportunity to review the work task loss assessment report developed by Mr. Hardin and agreed with Mr. Hardin's analysis and conclusions. Mr. Hardin's work task assessment report was entered into evidence at his deposition without objection. Therefore, the Appeals Board finds that the work task assessment report was made a part of the record of evidence and Dr. Schlachter's testimony, that he had reviewed the report and agreed with the conclusions based on his

permanent restrictions placed on claimant is the opinion of a physician as required by the statute. Therefore, the Appeals Board finds that claimant has a loss of ability to perform work tasks of 35 percent.

Furthermore, respondent argues that claimant, as a result of his work-related cervical injury and surgery, does not have a work task loss and, therefore, is limited to his functional impairment. The respondent contends this argument is supported by the testimony of claimant's treating physician, Dr. Hered, as he released claimant to return to his employment with the respondent as a carpet cleaner without permanent restrictions. The doctor also testified that claimant's injuries would not preclude him from returning to regular work in the open labor market. The respondent argues that when Dr. Hered released the claimant to return to work without restrictions that was equivalent to a physician testifying claimant had lost no work task performing ability. However, Dr. Hered, on cross-examination by claimant's attorney, testified that when he released claimant to return to work for the respondent without restrictions, "I knew what he did but I don't know how he did that job." The doctor also testified, on cross-examination, that if claimant's job requirements were different than what the doctor understood, then he could have a different opinion on whether claimant should have restrictions.

The Administrative Law Judge would not accept Dr. Hered's opinion that somebody after undergoing anterior cervical discectomy at C6-7 could be released without restrictions and therefore, he disregarded Dr. Hered's opinions. The Appeals Board also questions Dr. Hered's releasing claimant to return to his carpet cleaning job without permanent restrictions. Claimant's carpet cleaning duties, among other duties, required him to load and unload the carpet cleaning equipment; move and lift furniture; and clean the carpet with the heavy carpet cleaning equipment. Additionally, claimant testified at the regular hearing, that he remains symptomatic in both shoulders; had numbness in his left hand; and some residual numbness in his right thumb and one of his fingers.

The Appeals Board disagrees with respondent's argument that Dr. Hered's testimony, that he released claimant to return to work without restrictions, was equivalent to the doctor testifying that claimant had no work task loss as a result of his work-related cervical injury and surgery. Dr. Hered admitted he did not know the specific job duties claimant had to perform as a carpet cleaner for the respondent. He also admitted, that if those duties were different than what he understood, then restrictions could be appropriate. The Appeals Board concludes that Dr. Hered did not testify as to whether or not claimant had a loss of work task performing ability in the 15 years preceding his date of accident. The Appeals Board concludes that Dr. Schlachter's testimony, after reviewing Mr. Hardin's work task assessment report, was uncontradicted.

The second prong of the work disability test is the difference between claimant's pre-injury average weekly wage and his post-injury average weekly wage. Claimant at the time of the regular hearing established that he was unemployed and was not earning any wages. Claimant testified that he attempted to return to work for the respondent and

respondent did not offer him any work. Claimant also established he had actively sought and was presently actively seeking employment. He also was enrolled in a computer class at Wichita State University attempting to acquire additional job skills. The Appeals Board concludes that claimant proved he was making a good faith effort to find employment but remained unemployed. Therefore, the Appeals Board finds that claimant's wage loss prong of the work disability test is 100 percent.

K.S.A. 44-510e(a) requires both the 35 percent work task loss and the 100 percent wage loss be given equal weight in arriving at a work disability. Accordingly, the Appeals Board finds that the Administrative Law Judge's conclusion, that claimant is entitled to permanent partial disability benefits based on a work disability in the amount of 67.5 percent, should be affirmed.

The Appeals Board also adopts the findings and conclusions set forth in the Award of the Administrative Law Judge that are not inconsistent with the findings and conclusions in this Order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated January 9, 1997, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: W. Walter Craig, Wichita, KS
Gregory D. Worth, Lenexa, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director